

1. Did claimant sustain personal injury by accident arising out of and in the course of employment?
2. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

This claim hinges on claimant's credibility. Claimant has testified twice in this claim and has presented inconsistent testimony.

At the first preliminary hearing, which was held in July 2003 before Administrative Law Judge Jon L. Frobish, claimant testified he "felt a sharp pain or something pop"¹ in his neck on Friday, March 28, 2003, when he bent down to lift a skid. But the evidence established claimant did not work on that date. At the December 2003 preliminary hearing, claimant testified he had thought about it more and concluded the accident occurred on Thursday, March 27, 2003.

Claimant also testified at the July 2003 preliminary hearing that a coworker, Jeremiah Block, was helping him with the skid when he injured his neck. Again, respondent and its insurance carrier established at the first hearing that Mr. Block did not work on either March 27 or 28, 2003. At the December 2003 hearing, claimant testified he realized Mr. Block was not working at the time of the alleged accident as he was only on the premises that day to pick up his check.

Furthermore, respondent and its insurance carrier presented testimony and records that contradicted claimant's testimony. At the first preliminary hearing, respondent's production manager, Eddie L. Knox, denied that claimant had advised him on Tuesday, April 1, 2003, about injuring his neck or shoulder at work. At that hearing, respondent and its insurance carrier also introduced, without an evidentiary objection, respondent's office notes that indicated Mr. Block did not remember lifting a pallet with claimant.

Judge Hursh concluded claimant's testimony was not credible and, therefore, claimant had failed to prove that he injured his neck and shoulder while working for respondent. At this juncture of the proceeding, the Board finds no reason to disturb that finding. Consequently, the issue regarding timely notice of the accidental injury is moot.

¹ P.H. Trans. (July 9, 2003) at 6.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.²

WHEREFORE, the Board affirms the December 29, 2003 Order.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

c: Leigh C. Hudson, Attorney for Claimant
Mark J. Hoffmeister, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a(a)(2).